Critical Tax Theory: An Introduction

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Critical Tax Theory:
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Tax law is political. This book highlights and explains the major themes and methodologies of a group of scholars who challenge the traditional claim that tax law is neutral and unbiased. The contributors to this volume include pioneers in the field of critical tax theory, as well as key thinkers who have sustained and expanded the investigation into why the tax laws are the way they are and what impact tax laws have on historically disempowered groups. This volume, assembled by two law professors who work in the field, is an accessible introduction to this new and growing body of scholarship. It is a resource not only for scholars and students in the fields of taxation and economics, but also for those who engage with critical race theory, feminist legal theory, queer theory, class-based analysis, and social justice generally. Tax is the one area of law that affects everyone in our society, and this book is crucial to understanding its impact.

Critical Tax Theory
An Introduction

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Introduction

Tax law is political. That is a fundamental assumption of critical tax theory. Critical tax scholars ask why the tax laws are the way they are and what impact tax laws have on historically disempowered groups, such as people of color; women of all colors; lesbian, gay, bisexual, and transgendered individuals; low-income and poor individuals; the disabled; and nontraditional families. Far from being an organized "movement,"[1] however, critical tax theory is a label that applies loosely to the work presented in this volume.

Though working mostly independently of each other, these scholars have all been influenced by the seismic intellectual shifts in the legal academy that occurred from the 1970s through the 1990s, namely, the critical legal studies movement and its progeny – critical race theory, feminist legal theory, and queer theory. Scholars working in those fields encouraged investigation into the law's unrevealed biases. They sought to demonstrate how accepted understandings of the law are constructed and contingent. They inspired both their contemporaries and those who work in their wake – including critical tax theorists – to question aspects of the law that might otherwise seem normal, natural, or just plainly incontestable.

In the last fifteen years, there has emerged a small but steady stream of scholarship that, taken together, constitutes an incipient body of "critical tax

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[1] *See* Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707, 711 n.11 (2005) (briefly discussing the question of whether critical tax theory qualifies as a "movement" within the meaning[s] of the term put forward by sociologists).

scholarship." Specialty law reviews and journals have played a key role in bringing this new generation of critical analysis to the marketplace of ideas. This book, however, is the first to present critical tax scholarship as a distinct mode of inquiry. When viewed as a whole, it becomes clear that all critical tax scholarship shares one or more of the following goals: (1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements. Critical tax scholars employ a variety of methods to achieve these goals. Among other methods, the contributions to this book demonstrate how critical tax scholars bring "outsider" perspectives to the study of tax law; use historical material, contemporary case studies, and personal or fictional narratives to illustrate the practical impact of the tax laws on individuals and groups; interpret social science and economic data to show how the tax laws impact groups differently; and explore the interconnectedness of tax laws with economic forces such as the labor market (especially as it impacts women) and international financial and political development.

Students, teachers, researchers, and scholars of tax law and policy can use this book in a variety of ways. It may accompany traditional classroom instruction or serve as an overview for those who want an accessible introduction to this new and growing area of tax scholarship. It can serve as a resource for tax scholars who are curious about, or seek to refute, critical tax scholars' assertion that the tax laws – whether intentionally or unintentionally – reflect and even reify discrimination based

on race, gender, sexual orientation, class, disability, or family structure. Substantively, this book fills a noticeable gap in traditional approaches to the research, study, and teaching of tax law and policy. By organizing and presenting excerpts from critical tax scholarship, this book demonstrates that a complete study of tax law and policy requires an understanding of the historical, social, political, and cultural contexts in which the tax laws operate.

This book will interest students and scholars in the allied fields of critical race theory, feminist legal theory, queer theory, class-based analyses, and social justice generally. Tax is the one area of law that truly affects everyone in our society – at some point in our lives, we all directly or indirectly pay taxes of one sort or another, whether income, payroll, sales, property, excise, or transfer taxes. Yet, those interested in social justice generally overlook tax as an area of inquiry, probably deterred by its reputation as an arcane area of the law. By presenting critical tax scholarship in a format that is accessible to both the novice and the expert, we hope to help those working in allied fields to extend their theoretical inquiry to an area of law that might otherwise seem impenetrable to the nonexpert.

The ideas and arguments presented in this book are general enough for both students in an introductory tax course as well as experts in the field. It is our hope that this book will serve as a primary reference for students, teachers, researchers, and scholars of tax law and policy who want to understand, elaborate on, or respond to existing critical tax scholarship.

This book organizes representative samples of critical tax scholarship by general themes – historical perspectives on taxation, the goals of tax policy, the practical application of critical tax theory, race, gender, sexual orientation, the family, class, and disability. We also include a chapter on global critical perspectives on taxation and a chapter that presents arguments by scholars whose assessments of critical tax theory have not been entirely (or, in some cases, at all) positive. The chapters and the organization of articles within them do not follow a neat, chronological order. This is because critical tax theory has not developed along a linear path. Rather, it is a method of inquiry that scholars have begun to apply, in approximately the last fifteen years, to a broad range of tax laws. No substantive area or line of inquiry has been exhausted yet. Furthermore, articles placed in one chapter might just as well have been included in one or more other chapters because critical tax scholars often address the effects of multiple forms of subordination at the same time. This overlap stems from the fact that different forms of subordination are not akin to parallel lines moving in the same direction along separate tracks; instead, the different lines of subordination examined by critical tax scholars often cross each other to create an interlocking pattern of subordination. Yet, despite bringing multiple perspectives and methodologies to diverse issues, critical tax scholars are unified by their unwavering commitment to examining the impact of the tax laws on historically subordinated groups.

For the most part, the selections speak for themselves. Brief introductions to each chapter provide any necessary background and draw out the common themes in

the selections in that chapter. To make this book accessible to all readers, we have significantly pared down each of the included excerpts. We have chosen not to indicate where cuts have been made to the works, and we have deleted all nonessential footnotes. Except when correcting typographical errors in the original texts and making minor changes to create a uniform style for the book, we have reflected any changes in brackets. None of these changes affect the substance of the contributions; they are all intended merely to preserve the flow of the text.

This book should pleasantly surprise those who assume that tax is a dry and boring field. Even those familiar with tax scholarship may be surprised at the insights that critical tax theory can bring to a familiar subject. For those already writing in the critical tax field, it is our hope that this book will stimulate further research and provide encouragement to continue what can seem – even to a tax scholar – a lonely project.

Critical tax theory enhances our understanding of the substantive tax law as well as its historical, social, political, and cultural contexts and consequences. This book does not claim that critical tax theory is the only way (or even the best way) to approach tax law. It is a lens that one can pick up and put down, but it is a lens that is never far from our own eyes. We invite you to look through that lens and see the tax law differently.

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